



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1997

The Honorable Sherry L. Lee
Executive Director
Texas State Board of Examiners of
Psychologists
333 Guadalupe, Suite 2-450
Austin, Texas 78701

Letter Opinion No. 97-073

Re: Whether board rule that excludes testing materials and data from patient's psychological record is consistent with requirements of chapter 611, Health and Safety Code, granting patients access to their mental health records (ID# 39134)

Dear Ms. Lee:

You ask whether certain provisions of a rule promulgated by the Texas State Board of Examiners of Psychologists ("the board") are consistent with the requirements of chapter 611 of the Health and Safety Code. The board, as the agency responsible for certifying and licensing psychologists,¹ is authorized by section 8 of article 4512c, V.T.C.S., to "make all rules, not inconsistent with the Constitution and laws of this state, which are reasonably necessary for the proper performance of its duties." The board is also required to adopt and publish a code of ethics.² The board's rules must be consistent with state laws. We are asked to determine whether the board's rule that excludes "test data and protocols" from the definition of patient records is consistent with chapter 611 of the Health and Safety Code.

Chapter 611 of the Health and Safety Code provides confidentiality for "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional."³ A "professional" within this provision includes a psychologist licensed or certified by the board.⁴ Pursuant to section 611.0045 of the Health and Safety Code, "a patient is entitled to have access to the content of a confidential record made about the patient," with certain exceptions set out in the provision. "On receipt of a written request from a patient to examine or copy all or part of the patient's recorded mental health care

¹No one may be licensed as a psychologist unless the person is certified as a psychologist and has had at least two years of supervised experience in the field of psychological services. V.T.C.S. art. 4512c, § 21; *see also id.* § 11 (requirements for certification as a psychologist).

²*Id.* § 8(a).

³Health & Safety Code § 611.002(a).

⁴*Tumlinson v. State*, 663 S.W.2d 539, 542 (Tex. App.--Dallas 1983, pet. ref'd).

information,” a professional shall make the information available for examination during regular business hours and provide a copy to the patient, if requested.⁵

The rule that you inquire about governs confidentiality of and access to records of psychological services rendered by persons licensed and/or certified by the board. It is codified at title 22 of the Texas Administrative Code, section 465.22. For purposes of the rule, “psychological records include any information that can be used to document the delivery, progress, or results of any psychological services; including, but not limited to . . . any assessment, plan for intervention, consultation, handwritten notes, summary reports and/or *testing reports*.”⁶

Section 465.22(d)(5), which concerns releasing information about a patient, provides that “[t]est data and protocols belong to the psychologist,” and that “[t]est data and protocols shall be made available only to another qualified mental health professional and only upon receipt of proper written authorization from the patient/client or other individual legally authorized to release psychological records on behalf of a patient or client.”⁷

Thus, as you explain, the rule distinguishes “test data” from test reports. “Test data” refers only to the testing materials, test booklets, and protocols⁸ used in the testing to generate test results. The rule treats test data as records of the psychologist and not as patient records, so that these materials are not available to the patient. Test reports and test results are defined as part of the patient’s records and are available to the patient.

You indicate various policy reasons for the limitations on the disclosure of test data found in section 465.22(d)(5). You state that “inappropriate disclosure [of psychological test material] may seriously impair the security and threaten the validity of the test and its validity as a measurement tool,”⁹ for example, if an individual obtains prior knowledge of test items.¹⁰ In addition, you discuss

⁵Health & Safety Code § 611.008.

⁶TEX. STATE BD. OF EXAM’RS OF PSYCHOLOGISTS, 21 Tex. Reg. 9599-9600 (1996), *adopted* 22 Tex. Reg. 47 (1997) (to be codified as an amendment to 22 T.A.C. § 465.22(b) (emphasis added)).

⁷TEX. STATE BD. OF EXAM’RS OF PSYCHOLOGISTS, 21 Tex. Reg. 9599-9600 (1996), *adopted* 22 Tex. Reg. 47 (1997) (to be codified as an amendment to 22 T.A.C. § 465.22(d)(5)).

⁸A medical dictionary defines “protocol” as “a written plan specifying the procedures to be followed in giving a particular examination, in conducting research, or in providing care for a particular condition.” MOSBY’S MEDICAL, NURSING, AND ALLIED HEALTH DICTIONARY 1290 (4th ed. 1994). We assume the protocols you refer to consist of a set of instructions to be followed in giving and evaluating certain psychiatric exams.

⁹Request letter from Sherry L. Lee, Executive Director, *Texas State Board of Examiners of Psychologists*, to Sarah J. Shirley, Division Chief, *Attorney General Opinion Committee* (Sept. 23, 1996) on file with *Attorney General Opinion Committee*; see also TEX. STATE BD. OF EXAM’RS OF PSYCHOLOGISTS, 21 Tex. Reg. 9599, *adopted* 22 Tex. Reg. 47 (1997) (to be codified as an amendment to 22 T.A.C. § 465.22(d)(5)).

¹⁰See AMERICAN PSYCHOLOGIST, COMMITTEE ON PSYCHOLOGICAL TESTS AND ASSESSMENT, AMERICAN
(continued...)

the interests of companies that own test data used by psychologists and inform us that some test data is copyrighted or subject to other protections for intellectual property. You also state that the rule prevents the release of test data to individuals not qualified to interpret it, to protect such patients from potentially harmful effects that might arise from misunderstanding the test data. Psychologists are required by board rule to "ensure that an explanation of the results [of an assessment] is provided using language that is reasonably understandable to the person assessed or to another legally authorized person on behalf of the client."¹¹

While chapter 611 of the Health and Safety Code does not define patient records, it does refer to records relating to the "diagnosis, evaluation, or treatment of a mental or emotional condition or disorder, including alcoholism or drug addiction."¹² We have no difficulty in concluding that psychological tests relate to the diagnosis and evaluation of a mental or emotional condition, but we are unable in the opinion process to determine whether patient records within chapter 611 necessarily include "test data" as you have described it. The answer to this question requires the investigation and resolution of factual matters as to the content of test data, its relevance to patients, expert opinion as to the content of patient records, and other matters that cannot be determined in a legal opinion.¹³ Although we question whether this rule is valid, administrative rules are entitled to a presumption of validity.¹⁴ Accordingly, we cannot say that it is invalid as a matter of law.

We would like to point out a possible effect of this rule on records of a psychologist that are subject to the Open Records Act.¹⁵ Under the Open Records Act, all information maintained by governmental bodies is available to the public unless specifically excepted from disclosure.¹⁶ Chapter 611 of the Health and Safety Code excepts patient records created or maintained by a psychologist from disclosure to the public, but to the extent that test data are in fact not patient records, they will not be within the chapter 611 exception. However, depending on the nature of

¹⁰(...continued)

PSYCHOLOGICAL ASSOCIATION, STATEMENT OF THE DISCLOSURE OF TEST DATA, at 644-46 (June 1996) (discussing various issues of test security).

¹¹22 T.A.C. § 465.36(c)(2)(I).

¹²Health & Safety Code § 611.0045(j).

¹³Before section 465.22 was amended in 1996, the definition of psychological records included "testing reports and relevant supporting data." See 22 T.A.C. § 465.22(b)(1)(E) at 21 Tex. Reg. 9599-9600 (emphasis added). The amendment was adopted "to clarify the requirements for retention and release of test data and protocols to ensure test security and validity of the test for other consumers of psychological services." 21 Tex. Reg. 9599.

¹⁴See *Texas Railroad Comm'n v. Shell Oil Co., Inc.*, 161 S.W.2d 1022, 1026 (Tex. 1942); *McCarty v. Texas Parks and Wildlife Dept.*, 919 S.W.2d 853, 854 (Tex. App.--Austin 1996, no writ).

¹⁵Gov't Code ch. 552. Records of a mental health professional sometimes become part of a public employee's personnel file. See generally Open Records Decisions Nos. 565 (1990) (psychological records of former police officer); 314 (1982) (psychiatric evaluation of teacher included in personnel file).

¹⁶Open Records Decision No. 526 (1989).

particular items of test data, other statutes or legal doctrines may be relevant to questions of disclosure under the Open Records Act.¹⁷

S U M M A R Y

Pursuant to chapter 611 of the Health and Safety Code, which gives patients access to their patient records created or maintained by mental health professionals, the Texas State Board of Examiners of Psychologists has promulgated a rule that defines test results as patient records and excludes testing materials, test booklets, and protocols used in generating test results from the definition of patient records. We will accord the rule the presumption of validity that attaches to administrative rules.

Where records of a psychologist are subject to the Open Records Act, the confidentiality provisions of chapter 611 will exempt "patient records" from disclosure to the public, but will not exempt the testing materials excluded from the definition of patient records. However, other provisions of law may be relevant.

Yours very truly,



Susan Garrison
Assistant Attorney General
Opinion Committee

¹⁷For example, you state that items of "test data" are often copyrighted. The Open Records Act does not require the custodian of public records to furnish copies of copyrighted records to members of the public. Attorney General Opinions JM-672 (1987), MW-307 (1981). Such records are available for public inspection, and the person who requests them may make copies unassisted by the state. *Id.*